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IN THE

Supreme Court of the United States

October Term, 1964

No. 622

DENNIS J. BRITT,
Trustee of Frank James Damson, Bankrupt,
Petitioner,

v.

ALICE J. DAMSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Dennis J. Britt, the duly qualified trustee in bankruptcy of Frank James Damson, In Bankruptcy No. 49249 in the United States District Court, Western District of Washington, Northern Division, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 7, 1964, rehearing denied August 17, 1964.

OPINIONS BELOW

The United States District Court for the Western District of Washington, Northern Division, entered Findings of Fact and Conclusions of Law following oral opinion, all of which are unreported, but are printed in Appendix "B" of this petition.

The Court of Appeals for the Ninth Circuit judgment appears in 334 Fed.(2d) 896 (1964) and is printed in Appendix "C" of this petition, together with the Order Denying Rehearing.

JURISDICTION

The jurisdiction of the United States District Court was based on 11 U.S.C., Section 46; the jurisdiction of the United States Court of Appeals was based on 11 U.S.C., Section 47, and 28 U.S.C., Section 1291. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 7, 1964 and the order denying appellant's petition for rehearing or rehearing en banc was entered on August 17, 1964. The opinion, judgment and order denying rehearing and rehearing en banc are printed in Appendix "C" hereof.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254(1), and 11 U.S.C., Section 47(c).

QUESTIONS PRESENTED

1. Does a trustee in bankruptcy have a lien right, pursuant to Section 70c of the Bankruptcy Act, to property transferred by a decree of divorce by virtue of state law?

2. May a decree of divorce and conveyances pursuant thereto constitute voidable transfers under Section 70e(1) of the Bankruptcy Act and applicable state law?

3. Does the trustee's recovery benefit all creditors of the estate under the purview of this court's decision in *Moore v. Bay*, 284 U.S. 4 (1931), 52 S. Ct. 3, 76 L.Ed. 133, 76 ALR 1198, or may only limited creditors of the estate participate in any recovery by the trustee?

4. Does the division of property in a state court divorce action constitute "fair consideration" as a matter of law within the purview of 67d(2) of the Bankruptcy Act?

STATUTES INVOLVED

The provisions of Section 67d of the Bankruptcy Act (11 U.S.C. 107d), Section 70c of the Bankruptcy Act (11 U.S.C. 110c), Section 70e of the Bankruptcy Act (11 U.S.C. 110e) and Revised Code of Washington, Sections 26.16.030 and 26.16.050, are set forth in Appendix "A" of this petition.

STATEMENT OF THE CASE

Damson and his wife, residents of the State of Washington, were married on September 7, 1947, and separated on December 28, 1959. On January 10, 1960, she commenced a separate maintenance action against him, and in March 1961, sued him for divorce. A decree of divorce was entered on June 22, 1961. All proceedings were in the Superior Court of the State of Washington, no appeal having been taken therefrom (R. 84-85, 115-116).

During the course of their marriage, the Damsons de-

veloped a successful and prosperous construction business, leading to the accumulation of substantial community property under the laws of the State of Washington. All of this property was awarded to one or the other of them under the terms of the decree of divorce. Mr. Damson was required to assume and pay all of the community obligations (R. 85, 115-116).

On November 20, 1961, at a time when Damson was unmarried, he filed a petition in bankruptcy and was, on that day, adjudicated a bankrupt. Dennis J. Britt was thereafter appointed the trustee in bankruptcy and qualified (R. 85-86, 116).

Dennis J. Britt, trustee of Frank James Damson, bankrupt, brought this suit against the bankrupt's former wife, Alice J. Damson, to obtain title and possession of community property which had been awarded to her in the divorce proceedings. The trustee asked, in the alternative, that such property be declared the subject of an equitable lien in favor of the trustee (R. 116).

By pretrial order, the parties agreed that the only factual dispute in the case between the trustee in bankruptcy and the defendant was the issue whether Frank J. Damson was insolvent on the date of the divorce decree, or rendered insolvent by virtue of disposition of property incident to the divorce decree, or left with unreasonably small capital with which to carry on his business after the divorce decree (R. 87). Cross motions for summary judgment were made. Summary judgment was entered for Mrs. Damson, and the trustee appealed. The Court of Appeals for the Ninth Circuit reversed the District Court

and ordered the case remanded for further proceedings consistent with the opinion of the appellate court. Said decision and judgment were entered on July 7, 1964 (R. 115-126).

Thereafter petitioner herein, appellant below, petitioned for rehearing and rehearing en banc which petition was denied by order of the Court of Appeals on August 17, 1964 (R. 132).

The petitioner respectfully requests that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order that this Honorable Court may decide the very important and recurring questions presented.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit, in its decision below, Appendix "B", decided in effect that the trustee on behalf of creditors had no rights under the provisions of Sections 70c and 70e(1) of the Bankruptcy Act, Appendix "A" hereto, despite applicable state law to the contrary. In so doing, the Court of Appeals failed to accord to the trustee the rights of the general creditors he represents in accordance with the law of the State of Washington. The Court of Appeals, though recognizing that creditors existing at the time of bankruptcy might themselves have certain rights in the property of the former marital partners, determined that the trustee on behalf of such creditors did not occupy the status of such creditors. *Capitol National Bank of Olympia v. Johns*, 170 Wash. 250, 16 P.(2d) 452 (1932); *Farrow v. Ostrom*,

16 Wash. 547, 133 P.(2d) 973 (1943); and *Hanson v. Hanson*, 55 Wn.(2d) 884, 350 P.(2d) 859 (1960).

Of particular significance is the very recent State Supreme Court case of *Dizard & Getty v. Damson*, 163 Wn. (2d) 530, 387 P.(2d) 964 (1964), which was an action involving the same defendant and similar issues as the instant action. The Supreme Court of Washington held in said case that even during the separation of Mr. and Mrs. Damson prior to the divorce that the husband had authority to act for the marital community in the absence of a showing that he was disloyal to the business interest or was defrauding the marital community. The court said at page 534:

> "It is inconceivable that respondent may authorize the husband to carry on the community business, create a potential source of assets, ultimately share in those assets, and yet be immune from the claims of creditors who contributed to the accumulations, if any."

The court in said case went on to allow the attaching creditor to satisfy any deficiency of his judgment from the property of the parties, including the property awarded and distributed to Alice Damson by the divorce case.

The United States Court of Appeals for the Ninth Circuit did not recognize that the trustee stood in the shoes of existing creditors, and apparently either overlooked or refused to follow the decision of this Honorable Court in the case of *Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 603, 5 L. Ed.(2d) 323, 326; 81 S. Ct. 347, 349 (1961), wherein this Honorable Court said:

> "We think that one consistent theory underlies the several versions of § 70c which we have set forth, viz., that the rights of creditors—whether they are existing or hypothetical—to which the trustee succeeds are to be ascertained as of 'the date of bankruptcy,' not in an anterior point in time."

The United States Court of Appeals below failed to follow the decision of this Honorable Court in the classic case of *Moore v. Bay, supra*, page 3, when said court decided that any recovery of the trustee herein in this action would be for the benefit of a limited class of creditors of the bankrupt, namely those creditors of the bankrupt who were creditors of the former marital community and not for benefit of all unsecured creditors of the bankrupt generally. As the Honorable Mr. Justice Holmes stated in the case of *Moore v. Bay, supra*, page 3:

> "The Circuit Courts of Appeals seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that what thus is recovered for the benefit of the estate is to be distributed in 'dividends of equal percentum on all allowed claims, except such as have priority or are secured'."

The United States Court of Appeals below suggested that as a matter of law, the division of property in a divorce action by a state court was for "fair consideration" within the purview of Section 67d of the Bankruptcy Act (Appendix "A") and thus immune to claims of third party creditors and the trustee in bankruptcy representing them, insofar as the property was split equally between the parties to the divorce action or insofar as the husband's future obligations for support of the wife were thereby reduced. Such decision of the Court of Appeals entirely overlooked the fact that community creditors in the State

of Washington (or the trustee in bankruptcy representing them) must be satisfied out of the community property, despite the fact of a divorce, and that insofar as third party creditors or the trustee in bankruptcy representing them are concerned, the transfers made between marital partners incidental to a divorce decree are fraudulent under the terms of Section 67d(2) if made by a debtor who is or will be thereby rendered insolvent.

Accordingly, such decision is contrary to the cases of the Supreme Court of the State of Washington cited above and the Revised Code of Washington, Sections 26.16.030 and 26.16.050. It is further a completely novel proposition to suggest that a divorce decree transferring property between husband and wife was supported by "fair consideration" as a matter of law within the purview of 67d of the Bankruptcy Act to the extent that offsetting property was transferred from the wife to the husband or to the extent that the husband's requirements of future support were reduced. It is submitted that the "fair consideration" in no way restored the debtor's financial condition to the position where it had been prior to the transfers inasmuch as under applicable Washington law, the entire community assets of the former husband and wife were available to creditors before and after the divorce and the transfer of one-half or more of the property to the wife free of the claims of the trustees would in effect limit the trustee on behalf of the creditors to one-half or less of the assets of the debtor.

Although the Court of Appeals' decision below recognized that the individual creditors under Washington law

might fend for themselves and proceed against the property in the hands of the former wife, respondent herein, it held that the trustee was not so clothed with the rights of creditors. Such a decision, if not reviewed by this court and reversed, would result in a plethora of suits being brought by creditors on their own behalf instead of the trustee bringing one action on behalf of all creditors and the first creditors to obtain judgment or levy on property would receive payment in full whereas belated creditors would receive nothing. In such a situation, the equality of distribution which is the hallmark of bankruptcy proceedings would certainly be violated.

The question of rights of creditors and/or the trustee in bankruptcy after former marital partners have been separated by divorce, and their property divided between them, is a constantly recurring problem. Although state law is involved under Sections 70c and 70e of the Bankruptcy Act, the Court of Appeals' interpretation of state law and its application under Sections 70c and 70e of the Bankruptcy Act is contrary to numerous decisions of the Washington Supreme Court and should be reviewed.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

DENNIS J. BRITT, *Pro Se*

APPENDIX "A"

"Section 67d(2), Bankruptcy Act:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent . . .

• • • •

"(11 U.S.C.A. Sec. 107d)

"Section 70c, Bankruptcy Act:

". . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

• • • •

"(11 U.S.C.A. Sec. 110c)

"Section 70e(1), Bankruptcy Act:

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a

claim provable under this Act, shall be null and void as against the trustee of such debtor.

• • • •

"(11 U.S.C.A. Sec. 110e)."

Revised Code of Washington, Section 26.16.030. provides in pertinent part:

> "Property not acquired or owned, as prescribed in R.C.W. 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property."

Revised Code of Washington, Section 26.16.050. provides in pertinent part.

> "Conveyances between husband and wife. A husband may give, grant, sell or convey directly to his wife, . . . his . . . community right, title, interest or estate in all or any portion of their community real property: And every deed made from husband to wife, . . . shall operate to vest the real estate therein recited from any or every claim or demand as community property and shall vest the same in the grantee as separate property . . . *Provided, however,* That the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift or conveyance."

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

DENNIS J. BRITT, Trustee of Frank James Damson, *Plaintiff*, v. ALICE J. DAMSON, Defendant.	No. 5671

TRANSCRIPT OF ORAL DECISION in the above-entitled and numbered cause of action by the HON. WILLIAM J. LINDBERG, a United States District Judge, at Seattle, Washington, commencing at 2:00 o'clock p.m., September 9, 1963.

APPEARANCES

SIDNEY C. VOLINN, of Geraghty and Volinn, 655 Olympic National Life Building, Seattle, Washington, appeared for and on behalf of the Plaintiff; and

WILLIAM J. POWERS, of Whitmore, Vinton, Powers and Manion, 305 Hoge Building, Second and Cherry, Seattle, Washington, appeared for and on behalf of the Defendant.

WHEREUPON, the following proceedings were had, to-wit:

PROCEEDINGS

THE COURT: In *Britt v. Damson* I have reached an opinion. I will read it into the record. It isn't as full as I would like to make it. If the case is appealed, I don't know that I will prepare anything further; if the case is not appealed,

I may file a supplemental opinion which may be a little fuller.

This is the case of *Britt v. Damson*. This matter is before the court on cross motions for summary judgment which were filed after entry of the pretrial order.

It is undisputed that Frank J. Damson, formerly the husband of Defendant Alice Damson, filed his voluntary petition in bankruptcy some five months after a divorce decree terminated their marriage and decreed the distribution of the community property. The trustee for the bankrupt, alleging that some of the creditors listed in the bankrupt's schedules are creditors of the former marital community, claims to represent said community creditors and seeks to have the distribution of property under the divorce decree set aside, or alternatively to have an equitable lien on the property which was awarded to the defendant wife. A number of issues have been defined and argued by the parties, but there is one issue which must be decided before the other issues can be presented for decision. That is the question whether a divorced husband can, to any extent, subject community property awarded the wife in a contested divorce, and the community debts, to bankruptcy proceedings filed by him after the divorce.

I have carefully considered the briefs and authorities submitted by counsel. Counsel have cited no case, and my research reveals none, which answers the question here presented because the cases have not dealt with the situation in which a husband voluntarily seeks bankruptcy after the marriage has been terminated, and where a trustee seeks to bring in property of the community.

It appears that an involuntary adjudication of bankruptcy against a husband individually, while the marriage is continuing will ordinarily give the trustee the right to administer community property for the benefit of community creditors, in the absence of a showing sufficient to overcome the presumption that debts of the husband are community debts. *Hannah v. Swift*, 61 F.(2d) 307, Ninth Circuit, 1932; also *Gibbons v. Goldsmith*, 222 Fed. 826, Ninth Circuit, 1915; *Valley National Bank of Phoenix v. Fulton*, an Arizona case, 266 P.(2d) 397.

The case of *In Re Wallace*, 22 F.(2d) 171, Ninth Circuit, 1927, does hold, however, that, even while a marriage remains in existence, a husband may, by using appropriate language, file bankruptcy individually and be adjudicated bankrupt as to his individual property and separate debts without bringing community property into the bankruptcy estate, notwithstanding that by statutory presumption he is manager of the community property.

The instant case is much stronger than *In re Wallace*. When Frank J. Damson filed his voluntary petition as a single man, the marriage had been terminated. Damson could no longer act as manager or agent of the marital community and had no power to take the property or debts of the former community into bankruptcy with him had he intended to do so, which is by no means clear. Nor did he have the power to subject the separate property of his former wife to the bankruptcy proceedings. It follows that the bankrupt's trustee does not represent the interests of creditors of the former community as community creditors whatever their status may be as creditors

of Damson individually. The rights and remedies asserted by the trustee are those of creditors of the former community.

I recognize that under Washington law creditors of the former community may be able to subject the former community property which is now in Mrs. Damson's hands to satisfaction of obligations of the former community. However, in view of the general principles of Washington law relating to the marital community and to community property, and in view of the jurisdictional requirements of the Bankruptcy Act, I find that the trustee herein has no standing to assert the rights and remedies of creditors of the former community, and that none of the sections of the Bankruptcy Act under which he claims entitle the trustee of Frank J. Damson, a single man, to collaterally attack a valid divorce decree.

Plaintiff's motion for summary judgment will be denied and the defendant's motion for summary judgment will be granted.

Now, gentlemen, if you wish copies, you will have to get them from the reporter. If there is no appeal, I may file a supplemental or amended opinion setting forth more fully the reasons and, if possible, any further authority.

I believe that completes the matter. I will fix a time for submitting the judgment.

MR. VOLINN: "Monday afternoon, the 16th?"

THE COURT: "At two o'clock."

MR. POWERS: "Two o'clock."

(Whereupon, hearing was concluded.)

REPORTER'S CERTIFICATE

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, for the Western District of Washington, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause of action on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

DENNIS J. BRITT, Trustee of Frank James Damson, Bankrupt, *Plaintiff*, v. ALICE J. DAMSON, Defendant.	No. 5671

Findings and Order of Court Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment.

The above-entitled cause came on before this court on the defendant's motion for a summary judgment, and upon the plaintiff's cross motion for a summary judgment.

Messrs. Whitmore, Vinton, Powers & Manion, William J. Powers and Jack M. Whitmore, of counsel, appeared on behalf of the defendant; and Messrs. Geraghty & Volinn, Sidney C. Volinn of counsel, appeared on behalf of the plaintiff.

The court finds and concludes that it is undisputed that

Frank J. Damson, formerly the husband of defendant Alice Damson, filed his voluntary petition in bankruptcy some five months after a divorce decree terminated their marriage and decreed the distribution of the community property. The trustee for the bankrupt, alleging that some of the creditors listed in the bankrupt's schedules are creditors of the former marital community, claims to represent said community creditors and seeks to have the distribution of property under the divorce decree set aside, or alternatively to have an equitable lien on the property which was awarded to the defendant wife. A number of issues have been defined and argued by the parties, but there is one issue which must be decided before the other issues can be presented for decision. That is the question whether a divorced husband can, to any extent, subject community property awarded the wife in a contested divorce, and the community debts, to bankruptcy proceedings filed by him after the divorce.

The court further finds and concludes that when Frank J. Damson filed his voluntary petition as a single man, the marriage had been terminated. Damson could no longer act as manager or agent of the marital community and had no power to take the property or debts of the former community into bankruptcy with him had he intended to do so, which is by no means clear. Nor did he have the power to subject the separate property of his former wife to the bankruptcy proceedings. It follows that the bankrupt's trustee does not represent the interests of creditors of the former community as community creditors whatever their status may be as creditors of Damson

individually. The rights and remedies asserted by the trustee are those of creditors of the former community.

The court further finds and concludes that under Washington law creditors of the former community may be able to subject the former community property which is now in Mrs. Damson's hands to satisfaction of obligations of the former community. However, in view of the general principles of Washington law relating to the marital community and to community property, and in view of the jurisdictional requirements of the Bankruptcy Act, the court finds that the trustee herein has no standing to assert the rights and remedies of creditors of the former community, and that none of the sections of the Bankruptcy Act under which he claims entitle the trustee of Frank J. Damson, a single man, to collaterally attack a valid divorce decree.

The court further finds and concludes that plaintiff's motion for summary judgment will be denied and the defendant's motion for summary judgment will be granted.

DONE IN OPEN COURT this 16th day of September, 1963.

WILLIAM J. LINDBERG, *District Judge*

Presented with reservation of
objections to the Court's findings by:

GEORGE S. LUNDIN
of *Attorneys for Trustee*

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

DENNIS J. BRITT, Trustee of Frank James Damson, Bankrupt,	*Plaintiff,*	No. 5671
v.		
ALICE J. DAMSON,	Defendant.	

SUMMARY JUDGMENT

The motion of defendant for Summary Judgment, pursuant to Rule 56c of the Rules of Civil Procedure, having been presented; and the court having been fully advised; the plaintiff's motion for Summary Judgment having also been presented; and the court being fully advised;

The court finds that the defendant is entitled to a Summary Judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED that defendant's motion for Summary Judgment be, and the same is hereby, granted; and plaintiff has and recovers nothing by his suit; that his motion be denied, and that the defendant recover her costs and charges in her behalf expended. Enter:

DATED September 16, 1963.

WILLIAM J. LINDBERG, *Judge*

Presented by:

WILLIAM J. POWERS of
WHITMORE, VINTON,
POWERS & MANION
Attorneys for Defendant

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS J. BRITT, Trustee of Frank James Damson, Bankrupt, *Appellant*, v. ALICE J. DAMSON, *Appellee*.	No. 18973

(July 7, 1964)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Before: CHAMBERS, HAMLEY and HAMLIN, Circuit Judges

HAMLEY, Circuit Judge:

Dennis J. Britt, trustee of Frank James Damson, bankrupt, brought this suit against the bankrupt's former wife, Alice J. Damson, to obtain title and possession of community property which had been awarded to her in the divorce proceedings. The trustee asked, in the alternative, that such property be declared the subject of an equitable lien in favor of the trustee. Cross motions for summary judgment were made. Summary judgment was entered for Mrs. Damson, and the trustee appeals.

Damson and his wife, residents of the State of Washington, were married on September 7, 1947, and separated on December 28, 1959. On January 10, 1960, she commenced a separate maintenance action against him and, in March, 1961, sued him for divorce. A decree of divorce was entered on June 22, 1961.

During the course of their marriage the Damsons de-

veloped a successful and prosperous construction business, leading to the accumulation of substantial community property under the laws of the State of Washington. All of this property was awarded to one or the other of them under the terms of the decree of divorce. Mr. Damson was required to assume and pay all of the community obligations.

All of the property awarded to Mrs. Damson had been acquired during the marriage and prior to the separation. Under the terms of the decree, Damson was required to, and did, execute endorsements, deeds and other documents, and deliver to Mrs. Damson certain documents and instruments to effectuate the award to her. By July 26, 1961, these requirements had been met.

All accounts receivable of the construction business, all of the tools, equipment, supplies and physical assets of that business, and all bank accounts standing in the name of Damson, along with certain other items of property, were awarded to him. Several of the construction projects which had been started during the marriage were in progress during the time the Damsons were separated.

On November 20, 1961, at a time when Damson was unmarried, he filed a petition in bankruptcy and was, on that day, adjudicated a bankrupt. In the schedules annexed to his petition in bankruptcy, Damson listed the accounts receivable from these construction projects, and listed the creditors of the construction business. Dennis J. Britt was thereafter appointed trustee.

In seeking title to and possession of, or at least an equitable lien upon, the community property which had been

awarded to Mrs. Damson in the divorce proceedings, the trustee advances three theories, any one of which, if sustainable in fact and law, would have entitled him to the requested relief. One of these theories is predicated upon Section 70(c) of the Bankruptcy Act (Act), 11 U.S.C. §110(c) (1958), vesting in the trustee all the rights, remedies and powers of a creditor then holding a lien upon the property in question. A second theory is that the award of community property was a fraudulent or voidable transfer within the meaning of Section 70(e) (1) of the Act, 11 U.S.C., §110(e) (1) (1958). The third theory is that the award was fraudulent under Section 67(d) (2) (a) or (b) of the Act, 11 U.S.C. §107 (d) (2) (a) or (b) (1958).

The trial court granted summary judgment for Mrs. Damson on a single ground which, in view of the court, required rejection of each of these theories. That ground is succinctly stated in the following excerpt from the oral decision of the district court:

> "When Frank J. Damson filed his voluntary petition as a single man, the marriage had been terminated. Damson could no longer act as manager or agent of the marital community and had no power to take the property or debts of the former community into bankruptcy with him had he intended to do so, which is by no means clear. Nor did he have the power to subject the separate property of his former wife to the bankruptcy proceedings. It follows that the bankrupt's trustee does not represent the interests of creditors of the former community as community creditors whatever their status may be as creditors of Damson individually. The rights and remedies asserted by the Trustee are those of creditors of the former community."

We do not believe that the case may be disposed of on this ground. Under the Bankruptcy Act, as this court said in the recent case of *Schultz v. Mastrangelo,* 9 Cir., ... F.(2d) ....., n. 3, the petition in bankruptcy is not a transfer but a pleading, and the trustee is vested with the bankrupt's title not by act of the parties but "by operation of law." Section 70(a) of the Act, 11 U.S.C. §110; *Royal Indem. Co. v. American Bond & Mortgage Co.,* 289 U.S. 165, 171.

The question presented is not what authority the debtor had to represent the marital community at the time the bankruptcy petition was filed, or his then intent or power to "take" into bankruptcy what had formerly been community property. The only question is whether, under any of the provisions of the Act relied upon by the trustee, none of which are dependent upon the debtor's intent or authority at the time he went into bankruptcy, the community property awarded to Mrs. Damson under the divorce decree is, by operation of law, subject to the claims of any of the creditors in the bankruptcy proceeding. This calls for an application of the statutes in question to the facts of the case.

If, within the meaning of Section 70(c) of the Act, any of the creditors in the bankruptcy could have obtained a lien upon the property set over to Mrs. Damson, the trustee may foreclose that lien. If the award of community property was a fraudulent transfer within the meaning of Sections 70(e) (1), 67(d) (2) (a), or 67 (d) (2) (b), the trustee may set aside that transfer to the extent contemplated by the Act.

The judgment could possibly be sustained on the ground relied upon by the district court if, in Washington, a marital community is regarded as an entity separate and apart from the husband and wife. Then it could be at least plausibly argued that the entity having been terminated by divorce, the property thereof is not subject to adjudication in a bankruptcy proceeding in which only the former husband is debtor. But while there was a long period of time when the Washington courts likened a marital community to an entity,[1] this view was abandoned in 1930, with the decision in *Bortle v. Osborne,* 155 Wash. 585, 589, 285 Pac. 425, 427.[2]

For the reasons indicated the judgment cannot be sustained on the ground relied upon by the district court. But appellee argues, in the alternative, that in any event the correct result was reached when consideration is given to the individual theories relied upon by the trustee. We therefore turn to a consideration of each of these theories.

The first of these is that the creditors of the former marital community who have been scheduled as creditors in the bankruptcy of Mr. Damson could have obtained a lien by legal or equitable proceedings upon the community property which was awarded to Mrs. Damson in the divorce proceedings and therefore, under Section 70

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1 Washington decisions so holding extend from *Holyoke v. Jackson,* 3 Wash. Terr. 235, 239, 3 Pac. 841, 842, to *Mattinson v. Mattinson,* 128 Wash. 328, 222 Pac. 620.

2 See Mechem, "Creditors' Rights in Community Property," 11 Wash. L. Rev. 80, 86, in which the view was expressed that *Bortle v. Osborne* seems to ". . . unequivocally explode the entity theory of community. . . ." See, also, 1 de Funiak, Principles of Community Property, §95, at pages 267-268.

(c) of the Act, the so-called "strong arm" provision, the trustee may foreclose that lien in favor of those creditors.[3]

As indicated in Section 70(c), the property therein referred to need not be property which has come into the possession or control of the bankruptcy court. Nor is the lien therein referred to limited to encumbrances upon property in which the bankrupt has legal title. It extends to all property ". . . upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy. . . ." Thus since, under Washington law, those creditors of the bankrupt who were creditors of the former marital community could have obtained a lien by legal or equitable proceedings upon the community property set over to Mrs. Damson,[4] Section 70(c) broadly read, would seem to vest similar rights in the trustee.

Recourse to the legislative history of the Act of July 7, 1952, Section 23(e) of which clarified Section 70(c) of the Bankruptcy Act, indicates, however, that the latter section, as amended, should not be read this broadly. See H.R. Rep. No. 2380, 82nd Cong., 2d Sess. 16 (1952),

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[3] The second sentence of Section 70(c), pertinent here, reads as follows:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

[4] *Dizard & Getty v. Damson*, 63 Wn.(2d) 530, 387 P.(2d) 964; *Hanson v. Hanson*, 55 Wn.(2d) 884, 350 P.(2d) 859; *Farrow v. Ostrom*, 16 Wn.(2d) 547, 133 P.(2d) 974; *Capital Nat'l Bank v. Johns*, 170 Wash. 250, 16 P.(2d) 452.

1952 U.S. Code Cong. and Admin. News, Vol. 2, pages 1960, 1976. According to this House Report, what was intended to be said is that the trustee ". . . has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner." See, also, 4 Collier on Bankruptcy, (14th ed.) §70.47[4], p. 1396.[5]

So reading Section 70(c), which speaks as of the date of bankruptcy and not any prior date, and bearing in mind that when the petition was filed Damson had no interest in, or ostensible ownership of, the community property which had been awarded to Mrs. Damson, we hold that the trustee has come into no rights by virtue of that section of the Act.

There is another reason why we reach the same conclusion. Under Section 70(c) the trustee does not succeed to rights that run to creditors "personally," as distinguished from their rights as creditors of the bankrupt. See 4 Collier on Bankruptcy (14th ed.), §70[4], pp. 1398-1399. The liens which creditors of the marital community could assert against the community property awarded to Mrs. Damson are not based upon their claims against the bankrupt. Recovery of judgment by the former community creditors against the bankrupt would not constitute a lien, either legal or equitable, upon Mrs. Damson's

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[5] At 4 Collier, *ibid*, p. 1399, this observation is made:

"Sound bankruptcy administration is not served by a construction that exploits the literal potentialities of language, intended only or primarily to clarify, as a basis for overturning long accepted limitations on the trustee's power to interfere with rights and property not belonging to the bankrupt." (Footnote omitted.)

property. Such a lien as Washington law confers upon these creditors is one which could be asserted against Mrs. Damson independently of any remedy they may assert against Mr. Damson. See *Dizard & Getty v. Damson*, 63 Wn.(2d) 530, 387 P.(2d) 964. They are liens which would not be affected by Damson's discharge in bankruptcy. They are accordingly liens "personal" to these creditors which may not be enforced by the trustee under Section 70(c).

For the reasons indicated, we hold that the trial court did not err in granting summary judgment for Mrs. Damson, insofar as relief under Section 70(c) was sought.

The second theory on which relief is sought by the trustee is that the award of community property to Mrs. Damson pursuant to the decree of divorce was a transfer made or suffered by Mrs. Damson within the meaning of the Act, which transfer was fraudulent under the laws of Washington as against, or voidable by, those creditors of Mr. Damson who were creditors of the former marital community and therefore, under Section 70(e) (1) of the Act, such transfer was null and void as against the trustee.[6]

Passing the question of whether the award of property pursuant to the divorce decree was a "transfer" within the meaning of Section 70(e) (1), we conclude that, in

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[3] Section 70(e) (1) reads as follows:

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

With regard to this particular theory, the trustee focuses attention upon state law, and not federal law, pertaining to fraudulent transfers.

any event, such award was not, under the laws of Washington, "fraudulent as against or voidable for any other reason by . . ." the creditors of the former marital community.

It is true, as pointed out above, that these creditors have and may enforce equitable liens against the property so set over to the wife. This, however, is not because the award was "fraudulent" or "voidable" as to creditors of the marital community, but because the award purported only to settle property rights as between husband and wife, leaving unaffected the pre-existing rights of third persons. See *Farrow v. Ostrom*, 16 Wn.(2d) 547, 552, 133 P.(2d) 974, 976; *Arneson v. Arneson*, 38 Wn.(2d) 99, 227 P.(2d) 1016.

A "fraudulent" or "voidable" transfer may be set aside and the property returned to the transferor or his representative. This is just what the trustee would be empowered to do, under Section 70(e) (2), if this theory were found to be meritorious. We are not aware of any Washington decision in which it was held that creditors of a marital community which has been terminated by divorce may set aside a property award on the basis that it was a fraudulent transfer. Their only right as against such property is to enforce an equitable lien.

We accordingly conclude that the trial court did not err in granting summary judgment for Mrs. Damson, insofar as relief was sought under Section 70(e) (1).

The third theory relied upon by the trustee in seeking relief in this action is that the award of community property to Mrs. Damson pursuant to the divorce decree

was a transfer within the meaning of the Act, made by or on behalf of Mr. Damson without fair consideration within one year prior to the filing of the bankruptcy petition and therefore fraudulent as against the trustee under Section 67(d) (2) (a), because it assertedly left Mr. Damson insolvent, and under Section 67(d) (2) (b), because it assertedly left in Mr. Damson's hands an unreasonably small capital with which to carry on his construction business.[7]

Mrs. Damson argues that the award to her of community property pursuant to the decree of divorce was not a "transfer" within the meaning of Section 67(d) (2).

The term "transfer" as used in Section 67(d) (2) is defined in Section 1(30) of the Act, 11 U.S.C. §1(30), in the broadest possible terms.[8] As there defined, the term

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[7] Section 67(d) (2) (a) and (b) read as follows:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; . . ."

[8] Section 1(30) reads as follows:

"'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor; . . ."

includes, among other things, any ". . . mode, direct or indirect, of disposing of or of parting with property or an interest therein or with the possession thereof . . . absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. . . ."

The question of whether a particular occurrence is a "transfer" within the meaning of the Act is a matter of federal characterization. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-370. Therefore in deciding whether the occurrence in question was a "transfer" we are not concerned with what label Washington law has placed upon occurrences of this kind. We do, however, look to Washington law to determine what was actually done as a preliminary to applying the tests of "transfer" set out in Section 1(30) of the Act.

Prior to the divorce Mr. and Mrs. Damson each had a vested, equal, undivided interest in the community property.[9] Thus, if the award to Mrs. Damson had been limited to one-half of the community property it is at least arguable that no property interest of Mr. Damson's was transferred to his wife.

Under Section 1(30), however, a "transfer" is not limited to dispositions of property interests, but expressly includes any mode of disposing of or parting with the "possession" of property. Mr. Damson, along with Mrs. Damson, had joint possession of all of the community property, concomitant with his undivided one-half interest

[9] *United States v. Merrill*, 9 Cir., 211 F.(2d) 297, 301; *In re Heringer's Estate*, 38 Wn.(2d) 399, 405, 230 P.(2d) 297, 301.

therein. As to the part awarded to Mrs. Damson, he lost such possession and thus suffered a "transfer."[10]

As for the excess, if any, over 50 per cent of the community property set over to Mrs. Damson the award constituted a transfer of an interest in property theretofore held by Mr. Damson, within the meaning of Section 1(30).

For the reasons stated we do not agree with Mrs. Damson that the summary judgment, insofar as it rejects the trustee's theory based on Section 67(d)(2), is sustainable on the ground that the award of community property to Mrs. Damson was not a "transfer" within the meaning of the Act. No other ground for sustaining this facet of the judgment has been suggested.

The trustee does not contend that he was entitled to a judgment in his favor on this ground pursuant to his cross motion for summary judgment. Under Rule 56(e), Federal Rules of Civil Procedure, a summary judgment may be entered only where there is no genuine issue as to any material fact. The trustee concedes that he is not entitled to prevail under Section 67(d)(2)(a) unless Mr. Damson was insolvent at the time of the transfer, or thereby rendered insolvent. Likewise, the trustee concedes that he is not entitled to prevail under Section 67(d)(2)(b) unless the property remaining in Mr. Damson's hands after the transfer was an unreasonably small capital with which to carry on his construction business. These questions of *insolvency and capitalization present genuine issues as to material facts, requiring a trial in the district court.*

[10] As pointed out below, however, this part of the transfer was for a fair consideration, and so was not fraudulent under Section 67(d)(2).

While the parties have not adverted to it in their arguments in this court, we also call attention to the fact that, regardless of insolvency or lack of capitalization, no transfer is fraudulent under Section 67(d)(2)(a) or (b) unless ". . . made or incurred without fair consideration . . ."[11]

The transfer to Mrs. Damson was made pursuant to a decree of divorce granted to her. Having granted a divorce it was the duty of the divorce court, under Rev. Code of Wash. § 26.08.110, to make such disposition of the property of the parties, either community or separate:

> ". . . as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children . . ."[12]

To the extent that the value of the community property awarded to Mrs. Damson was offset by the value of the community property awarded to Mr. Damson, the "transfer" to Mrs. Damson was, as a matter of law, supported

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[11] As stated in Section 67(d) (1) (e) of the Act, 11 U.S.C. §107(d) (1) (e), consideration given for the property or obligation of a debtor is "fair"

> ". . . (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained."

[12] It is the law in Washington that the disposition of property in divorce actions is within the wide discretion of the trial court, and the Supreme Court of that state will not substitute its judgment unless there has been a manifest abuse of discretion. See *Friedlander v. Friedlander*, 52 Wn.(2d) 288, 362 P.(2d) 352; *Thompson v. Thompson*, 56 Wn. (2d) 683, 355 P.(2d) 1. Insofar as we are advised, no appeal was taken from the decree of divorce in *Damson v. Damson*.

by "fair consideration," as that term is defined in Section 67(d)(1)(c). To this extent the award to each amounted to no more than an equal partition of property in which, as indicated above, they each at all times had a vested, equal undivided interest.

To the extent that the award of community property to Mrs Damson may have exceeded half of the total value of the community property there is a question whether, under all of the circumstances, Mr. Damson received fair consideration as a matter of law.[13] As the parties have not presented argument on this question we leave it undecided at this time. If Mr. Damson did not receive fair consideration as a matter of law, then there will be a question of fact to be resolved as to this, as well as on the issues of insolvency and capitalization.

From what has been said it will be evident that, at most, the trustee can enforce rights only to the extent, if any, that the value of the award to Mrs. Damson exceeded one-half of the total value of the community property. If the trustee is found to have enforceable rights under Section 67(d)(2) in any such excess award, he may exert them only for the benefit of those creditors in the bankruptcy proceeding who were creditors of the former marital community, for Mr. Damson's separate creditors have no claim on the property awarded to Mrs. Damson.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

[13] It could be argued that obtaining one's release from a marriage, pursuant to a decree of divorce, and in connection therewith, obtaining a limitation upon the obligation, not terminated by divorce, to provide future support, such limitation being effectuated by a provision for alimony, give rise to a conclusive presumption of "fair consideration" for any transfer of community property made under that decree, unless made in bad faith or fraudulently. It may also be noted that, in this case, the obligation of Mr. Damson to provide future support for Mrs. Damson, was perhaps greater than in the ordinary case because Mrs. Damson was totally blind.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS J. BRITT, Trustee of Frank James Damson, Bankrupt, *Appellant*, v. ALICE J. DAMSON, *Appellee*.	No. 18973

APPEAL from the United States District Court for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and the cause is remanded for further proceedings consistent with the opinion of this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXCERPT FROM PROCEEDINGS OF MONDAY, AUGUST 16, 1964

Before:

CHAMBERS, HAMLEY & HAMLIN,

Circuit Judges

Order Denying Petition for Rehearing and Rehearing En Banc

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed August 4, 1964, and within time allowed therefor by rule of court, for a rehearing and rehearing en banc of above cause be, and hereby is denied.